Sussman v New York Art Students' League
2016 NY Slip Op 31717(U)
September 13, 2016
Supreme Court, New York County
Docket Number: 160779/2015
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

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GARY L. SUSSMAN and BARBARA J. SUSSMAN,

Plaintiffs,

Index No.: 160779/2015

-against-

DECISION AND ORDER

NEW YORK ART STUDENTS' LEAGUE, SALVATORE BARBIERI and ROBERT TELENICK,

Defendants.

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Robert R. Reed, J.:

In this action, defendants New York Art Students' League (League), Salvatore Barbieri (Barbieri) and Robert Telenick (Telenick) move to dismiss plaintiffs Gary L. Sussman (Sussman) and Barbara J. Sussman's amended complaint. For the reasons set forth below, the court grants the motion in part.

The crux of plaintiffs' claims is that Sussman was terminated from his position at the League. Plaintiffs allege that the dismissal was based upon a biased investigation.

Parties to this action

Sussman is an artist and sculptor who taught sculpture at the League from 1992 to 2014. From 2004 to 2014, Sussman served as director of the Vytlacil residency program in addition to teaching sculpture and drawing at the League's main building.

Barbara Sussman (Bsussman) is the wife of Sussman and is a painter, appraiser, art

consultant, curator and Life Member of the Art Students' League.

Defendant League is an independent art school, organized as a not-for-profit corporation under the laws of the State of New York. The League offers an international residency program, as well as workshops and exhibitions, at its Vytlacil campus, located in Sparkill, New York.

Defendant Barbieri is the president of the League's Board of Control. Sussman alleges that Barbieri is not an artist, but is instead a "professional construction manager" with "long-standing ties to lawyer Peter Britell of the Venable Law Firm, which represents the League in [a] challenged air rights transaction" (amended complaint, ¶ 5).

Defendant Telenick is a League employee. Sussman alleges that Telenick previously worked as Sussman's subordinate at the Vytlacil campus, "who coveted Sussman's position as director of the campus" (*id.*, ¶ 8).

Background

In the amended complaint, plaintiffs allege that, on or about October 23, 2014, the Board of Control of the League received a written complaint from Telenick, alleging unacceptable behavior by Sussman, the Director of the League Residency at Vytlacil.

According to plaintiffs' allegations, immediately after the letter was sent, Sussman was relieved of his teaching duties, the exhibition of Sussman's students' work was cancelled, Sussman was immediately barred from the Vytlacil campus, and he was instructed not to communicate with his students or colleagues. Further, plaintiffs allege that they were locked out of the apartment which they had occupied on the Vytlacil campus for 10 years, without legal process or reasonable notice, their apartment was "ransacked" by League personnel, they were unable to retrieve their belongings for months and defendants stole their personal mail.

Additionally, according to plaintiffs' allegations, defendants removed paintings from plaintiffs' apartment, on which Bsussman was consulting for sales purposes, and returned them directly to their owner.

In his October 23, 2014 complaint letter addressed to the "Administrative Manager-Art Students League of NY," Telenick states, in part:

> "I would strongly recommend that the Whistleblower Committee take immediate action to investigate the unacceptable behavior of Gary L. Sussman . . . . I stand witness to the fact that he has continually violated acceptable conduct as described in the employee handbook . . ."

(Volpe affirmation, exhibit C).

In his amended complaint, Sussman describes Telenick's letter:

> "Telenick's letter claimed that Sussman had created a hostile work environment through conduct directed, not against Telenick, but rather against various other persons. Telenick further claimed that Sussman had: a) offended women by mentioning 'blow jobs' at lunch; b) criticized the League's administration at lunch, [particularly, the Executive Director, with comments like "Ira means well, but he does not know what he is doing"]; c) responded inappropriately to an employee's spontaneous revelation that she was raped [by a man who broke into her building] while a college student [Sussman joked to the assembled employees 'What did you do? Marry him?']; d) suggest[ed] that a female employee, Rhaiza Padilla, walk around nude in decorative boots for his amusement; e) suggested that a female work-study student, Caroline Allen, 'pose in a French maid costume for him; and f) offended Vytlacil resident artist Dierdra Hazeley by discussing John Lennon's song *Woman is the Nigger of the World*"

(Volpe affirmation, exhibit A (complaint), ¶ 9).

Plaintiffs allege that the League

> "purported to retain an independent counsel to investigate Telenick's allegations against Sussman. The counsel retained, Kristine Sova, was in fact anything but independent. She had recently left the Venable Law Firm, which represents the League in the corrupt air rights transaction, to set up a solo practice . . . . When League President Barbieri instructed Ms. Sova not to interview Caroline Allen and Dierdra Hazeley, and instead rely upon hearsay, Ms. Sova acceded to this

demand"

(*id.*, ¶ 17).

On December 3, 2014, Sova issued an Investigation Report (Report). Part IX of the Report is divided into 32 allegations, of which 17 were substantiated, eight were substantiated in part, and seven were found to be inconclusive. Witnesses' names were all redacted. The allegations that were substantiated included claims that Sussman made comments of a sexual nature in the presence of students and faculty, made racist comments regarding Chinese people, and criticized the League's Board of Control and Ira Goldberg, the Executive Director of the League, in front of staff and/or residents.

On December 10, 2014, the League formally terminated Sussman's employment. The League allegedly did not pay Sussman for his accrued vacation days and sick days. On December 18, 2014, Barbieri sent a letter to all League instructors, stating that Sussman had been relieved of his employment duties. On March 11, 2015, a meeting was held at the League and attended by approximately 40 members. According to Sussman, he was banned from the meeting.

He alleges that on March 24, 2015, Barbieri announced a meeting of the League faculty to be held on March 29, 2015. At this meeting, along with other statements, Barbieri informed the faculty that Sussman had been fired for misconduct. A general members meeting was held at the League on April 8, 2015. Sussman alleges that he was not permitted at the meeting. On April 24, 2015, Barbieri sent a letter concerning Sussman to all League "'faculty, members and friends'" (*id.*, ¶ 27), containing statements about the investigation into Sussman's alleged misconduct.

An expulsion hearing took place on July 6, 2015. Barbieri made additional statements, and approximately 20 people testified "in Sussman's defense" (*id.*, ¶ 31). The Board of Control reserved decision. On August 10, 2015, the Board of Control sent a letter to Sussman informing him that he had been expelled from the League for conduct unbecoming a member.

On September 8, 2015, Barbieri sent a letter to the "League's entire membership" (*id.*, ¶ 35) "accusing [Marne] Rizika [who was running against Barbieri for League president] of improper motives for running for League President, and vituperatively attacking Sussman" (*id.*, ¶ 35). Finally, according to the amended complaint, Telenick was promoted "and is effectively in charge of the League's Vytlacil campus" (*id.*, ¶ 36).

There are 15 causes of action set forth in the complaint, including injurious falsehood, libel and slander, tortious interference with business advantage, unlawful eviction and trespass to chattel, tortious interference with contract and tortious interference with prospective business relations, intentional infliction of emotional distress, prima facie tort, conversion, failure to compensate Sussman for accrued vacation time and sick days, and negligence.

Defendants move to dismiss the complaint on the grounds that: (1) Barbieri is entitled to qualified immunity as an uncompensated president of a New York not-for-profit organization; (2) the Telenick letter is protected under the "common interest" qualified privilege; (3) in the first cause of action, Sussman fails to allege sufficient facts to demonstration that Barbieri and Telenick knowingly published false matter about Sussman; (4) defendants are entitled to qualified immunity with respect to Sussman's defamation claims; (5) Sussman's libel claims should be dismissed as Sussman fails to allege specific false statements; (6) Sussman's claims of slander against Barbieri and the League do not allege special damages or constitute slander per

se; (7) plaintiffs lack standing to bring an unlawful eviction claim; and (8) plaintiffs do not allege that the at-issue chattel suffered any damage to support their claim for trespass to chattel.

Further, defendants argue that plaintiffs are unable to make out a prima facie claim for: intentional infliction of emotional distress, prima facie tort, conversion, negligence, interference with business advantage, failure to compensate Sussman for accrued vacation and sick time, and Bsussman's claims for trespass to chattel, and tortious interference with contract.

Discussion

a. Standard for Motion to Dismiss

On a motion to dismiss, the "court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). The "proper inquiry is whether a cause of action exists, not whether it has been properly stated" (*Rosen v Raum*, 164 AD2d 809, 811 [1st Dept 1990]).

b. Barbieri's Entitlement to Qualified Immunity

Defendants argue that Barbieri is entitled to qualified immunity and, as a result, dismissal of the claims against him. It is well-settled that qualified immunity "is an affirmative defense and an issue of law which the court should decide at the earliest possible stage of the litigation, and it may be raised and decided on a motion to dismiss prior to discovery" (*Liu v New York City Police Dept.*, 216 AD2d 67, 69 [1st Dept 1995][citations omitted]). Both Not-for-Profit Corporation Law § 720-a and CPLR 3211 (a) (11) provide qualified immunity to members of volunteer, not-for-profit organizations from liability absent a showing of gross negligence (*Kofin*

v Court Plaza, Inc., 23 Misc3d 1121[A] 2009 NY Slip Op 50846[u] [Sup Ct, NY County 2009]). This statute, N-PCL 720-a shields directors and officers of not-for-profit corporations who serve without compensation from liability based solely upon their conduct in the execution of their office, unless plaintiff can offer some evidentiary proof showing "a fair likelihood that he or she will be able to prove that the defendant was grossly negligent or intended to cause the resulting harm" (*Rabushka v Marks*, 229 AD2d 899, 900 [3d Dept 1996]).

In *Rabushka*, the Court found that there were triable issues of fact as to whether the defendants' statements were made with malice, and described this as: "with spite or ill will or with knowledge of their falsity or with reckless disregard as to their truth or falsity" (*id.*, 229 AD2d at 902). "Gross negligence is the commission or omission of an act or duty owing by one person to a second party which discloses a failure to exercise slight diligence. In other words, the act or omission must be of an aggravated character as distinguished from the failure to exercise ordinary care [internal citation omitted]" (*Kofin*, 23 Misc3d 1124[A] 2009 NY Slip Op 508769[u] at *5).

Thus, under CPLR 3211 (a) (11), a high threshold must be met by plaintiff to overcome the shield that this section supplies for those voluntary directors of not-for-profit companies, requiring plaintiff to "lay bare proof supporting the alleged grossly negligent or intentional conduct" (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:34a).

Barbieri avers in an affidavit supporting defendants' motion that he was an uncompensated officer of the League's Board of Control, and the League is a not-for-profit organization under Section 501 (c) (3) of the Internal Revenue Code. Plaintiffs do not dispute

these facts. Thus, the only issue for the court to determine on the question of Barbieri's entitlement to qualified immunity is whether plaintiffs lay bare sufficient proof that he engaged in conduct constituting gross negligence.

Sussman argues that Barbieri engaged in gross negligence. He argues that the amended complaint contains examples of Barbieri's conduct, which was intended to cause harm to Sussman, because Barbieri knew that Sussman was aware of his conflict of interest and critical of his administration. He then catalogues, in his opposition memo, Barbieri's allegedly offending statements that appear in the complaint. For example, Sussman states that at a League meeting on March 29, 2015, Barbieri informed faculty that Sussman was "fired for misconduct," that "racism was involved" and that "rape was involved" (amended complaint, ¶ 25). Sussman argues that the statement could have given those present at the meeting the false impression that Sussman had been accused of rape, an impression for which there is no evidentiary support in the papers submitted to the court. Sussman also identifies Barbieri's statement in an April 24, 2015 letter that Sussman's employment by the League had been terminated for sexually inappropriate comments as well as 'bigotry and racism,' and that at a March 11, 2015 meeting held at the League, Barbieri "falsely claimed that three audiotapes of Sussman's statements proved Sussman to be a sexual harasser" (amended complaint, ¶ 26).

As described below, the court grants qualified immunity to Barbieri on all the statements as alleged in the amended complaint, except for those set forth in the previous paragraph: that "rape was involved," and "racism was involved" in Sussman's termination, that Sussman was terminated for bigotry and racism, and that three audiotapes established Sussman's misconduct. As for these statements, Sussman has, for the purposes of defeating the motion, sufficiently

alleged intentional or grossly negligent conduct. Sussman has presented enough in his papers to show that a factfinder could find these allegedly false statements of fact were made about Sussman for the specific purpose of placing Sussman in a negative light. The court finds no grounds in the Report, which Barbieri appears to have relied upon for his statements to the Board and the members, to support the facts in these statements. As a result, the court finds plaintiffs have set forth sufficient proof that the statements were made with a reckless disregard for the truth, excepting them from any immunity.

c. Telenick's Letter and the "Common Interest" Qualified Privilege

Defendants argue that the claim against Telenick should be dismissed, as the October 23, 2014 letter is protected by the "common interest" privilege. According to defendants, Telenick and the Board "plainly shared a 'common interest' in the safety, reputation, and success of The League's Vytlacil residency program. Indeed, the Whistleblower Committee to which Defendant Telenick complained exists to monitor behavior and create a work environment free of harassment" (defendants' mem of law in support at 7).

Defendants further argue that Sussman undermines his own argument that Telenick acted with actual malice, because Sussman does not challenge the merits of Telenick's allegations against him, but, instead, re-characterizes the subject statements as "joking remarks" that were "distant" and "made in the past" (mem of law in support of defendants' motion to dismiss at 8).

In the complaint, Sussman alleges a claim of libel against Telenick by "sending to the Board of Control of the Art Students' League, a[n October 23, 2014] letter containing many false and defamatory statements" (Volpe affirmation, exhibit A, ¶ 41). It is Sussman's position that Telenick knew his statements were false and were made with the intention of injuring Sussman's

professional reputation, causing him to lose his employment. In fact, Sussman alleges that Telenick "coveted" Sussman's job, and, therefore, sent the letter with the purpose of getting Sussman fired (*id.*, ¶ 6), and taking over Sussman's job.

Sussman further alleges that Sova's investigation revealed that

> "Telenick systematically twisted Sussman's words so as to transform joking remarks into exploitative *quid pro quo* sexual harassment in the form of requests for sexual services. For example, Sova learned that Sussman never requested that Caroline Allen pose for him in a French maid costume – a suggestion that sound[s] like sex play. . . . Telenick's deliberate and malicious distortions should have alerted Sova to the fact that nothing Telenick said was trustworthy, but Sova blindly credited all of Telenick's hearsay that was not affirmatively disproved"

(*id.*, ¶ 19).

In the October 2014 letter, Telenick cites examples of statements made by Sussman in 2012 and 2013. Telenick states that he "resigned his position at the League Residency and transferred to the [League's building in New York City] . . . so that I would not have to report to Mr. Sussman" (Volpe affirmation, exhibit C at 1). He describes remarks allegedly made by Sussman of which he had first-hand knowledge.

The "common interest" privilege "extends to a communication made by one person to another upon a subject in which they both have an interest so as not to impede the flow of information between persons sharing a common interest. However, this privilege may be dissolved by a showing that the defendant acted with malice [internal citation omitted]" (*Rabushka*, 229 AD2d at 902); *Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 259 [1st Dept 1995][statements among fellow employees about an employee in an employment context may enjoy qualified privilege]). "The plaintiff may overcome this qualified privilege with allegations that the defendant made the defamatory statement with malice or reckless disregard

for the truth or falsity of the statement" (*O'Neill v New York Univ.*, 97 AD3d 199, 212 [1st Dept 2012]).

Here, it is apparent that the statements Telenick made to the Board of Control of the League were communications related to work in which Telenick, an employee of the League, and the League's Board of Control shared a common interest. As for this criteria, the challenged statements, therefore, fall within the privilege. However, Sussman alleges that Telenick reported false information solely for the purpose of harming Sussman and taking his position as director of the Vytlacil campus. The court finds, however, that these conclusory allegations, for which there is no support, do not overcome the privilege. Telenick reported the statements from his own first-hand experiences. These statements caused concern in Telenick, and Sussman does not entirely deny making them, but instead he states that Telenick transformed Sussman's "joking remarks into exploitative *quid pro quo* sexual harassment in the form of requests for sexual services" (plaintiffs' mem in opp at 8). As reflected in the Report, it appears that numerous individuals corroborated Telenick's statements, as set forth in his letter. For these reasons, the court is unable to find any ground that would merit a trial on the question of whether Telenick acted with malice. The court consequently finds that Telenick is entitled to qualified privilege and dismisses the claims of libel as against him.

d. The First Cause of Action for Injurious Falsehood

Sussman alleges injurious falsehood against all the defendants on the grounds that they: "falsely informed thousands of people in Sussman's professional community that he was accused of sexual harassment and racism by victims of such conduct," including the fact that an investigation was undertaken and allegations were substantiated. Further, Sussman alleges that

"Barbieri, speaking in his official capacity, also implied that Sussman is a rapist by stating that his misconduct "'involved rape'" (amended complaint, ¶ 38).

Defendants move to dismiss this claim on the ground that Sussman is unable to articulate the first element of the claim. "The action for injurious falsehood lies when one publishes false and disparaging statements about another's property under circumstances which would lead a reasonable person to anticipate that damage might flow therefrom" (*Cunningham v Hagedorn*, 72 AD2d 702, 704 [1st Dept 1979]). In *Cunningham*, the First Department found: "The acts set forth in the *in-camera* affidavit, might well support an action for defamation. However, they do not concern themselves with plaintiff's property. Hence, they may not be the subject of an action for injurious falsehood" (*id.*).

Likewise, Sussman's allegations that defendants circulated information about Sussman, involving sexual harassment and racism, do not pertain to Sussman's property, and, therefore, may not be the basis of this claim. The Court dismisses Sussman's first cause of action against all defendants.

e. The Second Cause of Action by Sussman against Telenick for Libel on October 23, 2014

As discussed above, the court finds that Telenick is entitled to a qualified privilege defense under the common interest doctrine. Because Sussman is unable to meet his burden in establishing malice, the second cause of action against Telenick is dismissed based upon the privilege.

f. The Third through Seventh Causes of Action by Sussman Against Barbieri and the League for Slander and Libel

"'The elements of a cause of action for defamation are a false statement, published

without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se'[internal citation omitted]" (*Konig v CSC Holdings, LLC*, 112 AD3d 934, 935 [2d Dept 2013]). "'In determining whether a complaint states a cause of action to recover damages for defamation, the dispositive inquiry is whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff'[internal citation omitted]" (*id.*).

"Slander as a rule is not actionable unless the plaintiff suffers special damage" (*Liberman v Gelstein*, 80 NY2d 429, 434 [1992]). Special damages include "'the loss of something having economic or pecuniary value'" (*id.* at 434-435). A claim of slander per se does not require proof of special damages, and must be supported by statements, among others, "that tend to injure another in his or her trade, business or profession" (*id.* at 435).

In determining whether the challenged statement is defamatory, the court must decide whether "a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff" (*Kamchi v Weissman*, 125 AD3d 142, 156 [2d Dept 2014]). "Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*id.* at 157). Although distinguishing between fact and opinion is a difficult task, the Court of Appeals has identified factors to consider when performing this task:

> "'(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely

to be opinion not fact'"

(*id.*, at 157, quoting *Mann v Abel*, 10 NY3d 271, 276 [2008])).

In the third and fourth causes of action, Sussman claims slander per se against Barbieri and the League for statements made by Barbieri on March 29, 2015 and on April 8, 2015. Specifically, Sussman alleges that, at a meeting held at the League on March 29, 2015, Barbieri slandered Sussman by stating that Sussman was terminated from his employment for misconduct that "involved rape," thereby implying that Sussman was a rapist. Barbieri further slandered Sussman by stating that "racism was involved," implying that Sussman was a racist (amended complaint, ¶ 44). Additionally, Sussman alleges that, at a meeting on April 8, 2015, Barbieri slandered Sussman by falsely stating that "three audio-recordings of Sussman's remarks showed him to be a sexual harasser" (*id.* at ¶ 47). Sussman alleges that as a consequence of the statements, he was not hired as a sculptor instructor at Middlebury College, and anticipates receiving fewer sculpture commissions.

As discussed above, the court finds that these statements, that Sussman's misconduct "involved rape" and that there were "three audio-recordings of Sussman's remarks" showing him to be a sexual harasser, satisfy the elements of a defamation claim and gross negligence, at this stage in the litigation. There is nothing in the Report that suggests that Sussman's misconduct involved rape, and a reasonable person hearing this statement could falsely conclude that Sussman was allegedly involved in a rape. Accordingly, assuming that the statement is proven false, a fact finder could find that Barbieri's statements evince a deliberate and reckless disregard of the truth for the purpose of harming Sussman. Likewise, the allegedly false statement about the existence of videotapes that would establish Sussman's conduct as a sexual harasser is an

equally harmful statement about Sussman. As the investigator, in the Report, substantiated the allegation that Sussman "made racist comments regarding Chinese people," the court does not find that Sussman can establish that Barbieri's statement that Sussman's termination "involved racism" is false. The court, therefore, will not dismiss the claims of slander per se set forth in the third and fourth causes of action and based upon these statements.

In the fifth cause of action, Sussman claims libel against Barbieri and the League for statements Barbieri made in a letter sent on April 24, 2015 to "thousands of people in Sussman's professional community, including the entire membership of the League" (*id.* at ¶ 50). Sussman alleges that the "untruthful gist of the letter was that numerous persons had accused Sussman of sexual harassment and racist speech, and 24 allegations of misconduct of a sexist or racist nature had been sustained against Sussman following a complete and unbiased investigation" (*id.*).

Of this letter, Sussman specifically states:

> "The letter falsely stated that an investigation had been conducted by an independent investigator. It further falsely stated that: (a) no restrictions had been placed upon whom the investigator interviewed, (b) the 'complainants' had been interviewed, and (c) the investigator had reviewed the documentary evidence pertinent to the allegations. The letter gave the false impression that the investigation had been initiated by various 'members of the community' (i.e. various women and people of color), rather than by one ambitious white man, Telenick, who coveted Sussman's position. The letter went on to state that: (a) 'the investigator found that 24 of the allegations were substantiated by the investigator, while 8 [sic] of he [sic] allegations were inconclusive,' and (b) Sussman's employment by the League had been terminated for sexually inappropriate comments as well as 'bigotry and racism'"

(*id.*).

The court finds that none of the above statements, set forth in the April 24, 2015 letter, satisfy the elements for a defamation claim, let alone pass the test for gross negligence. In order

to establish a claim of defamation, plaintiff must allege, at a minimum, that the defendant's statements conveyed false facts about the plaintiff (*see Gross v New York Times Co.*, 82 NY2d 146, 152 [1993]). Here, the statements pertain to the investigation, including whether restrictions were placed on the interviewer, whether the interviewer reviewed documents and those who were interviewed. They are not statements about Sussman. Statements about the League's investigative process, even if false, are not defamatory statements about Sussman. Further, Sussman's concerns, and conclusory statements, about the independence of the investigator, do not support a finding that Barbieri's statements were false or constituted gross indifference to the truth. Nor does the statement, "[t]o protect the confidentiality of the complainants and witnesses . . ." (amended complaint, exhibit A at 2) constitute gross negligence. Even if this statement were to convey a false impression about the number of individuals who initially complained about Sussman, it is neither a statement about plaintiff, nor does it convey a false impression of Sussman.

Additionally, because Barbieri's statements, as set forth in the letter, were made in reliance upon the Report, which contains multiple statements by witnesses about Sussman's conduct, the court cannot find that the word "complainants," rather than "complainant," reflects spite or ill will or a reckless disregard for the truth.

Likewise, the final two statements at issue, from this letter, cannot support a defamation claim. Barbieri's two statements about the investigation and its conclusions, that the investigator found that 24 statements were substantiated, while eight were not, and that Sussman's employment was terminated for sexually inappropriate comments as well as bigotry and racism, do not satisfy the claim. Sussman makes a conclusory assertion that the investigation was biased

and flawed, which even if true does not support a defamation claim against Barbieri, who is describing the results of the Report. Section IX of the Report is divided into 32 allegations, of which 17 were substantiated, eight were substantiated in part, and seven were found to be inconclusive. Further, several allegations based upon sexually inappropriate comments were substantiated, and the portion of allegation number three "that [Sussman] made racist comments regarding Chinese people" was substantiated. Thus, Sussman offers no grounds for this court to find Barbieri's statements about the investigation and its conclusions were false, or reckless. The court, therefore, dismisses the fifth cause of action.

In the sixth cause of action, Sussman alleges libel against Barbieri and the League for statements made in an August 10, 2015 letter "sent to thousands of people in Sussman's professional community, including the entire membership of the League" (amended complaint, ¶ 53). The letter states, in part, "the Board found Mr. Sussman guilty of conduct unbecoming a member of the League and voted unanimously to expel Mr. Sussman from Membership in the League" (*id.*). Sussman alleges that this statement conveyed the false impression that he had been found "guilty" following a hearing.

According to Sussman's allegations as set forth in the amended complaint, "an expulsion hearing was in fact scheduled for July 6, 2015 . . ." (amended complaint, ¶ 28). Furthermore, Sussman alleges that the hearing took place, that approximately 20 people testified in his defense, and that at the conclusion of the hearing, the Board reserved decision. Once again, the court finds that Barbieri's letter does not contain statements about Sussman that deliberately and recklessly convey falsehoods about him, and dismisses this cause of action.

In the seventh cause of action, Sussman alleges libel against Barbieri and the League

based upon statements made in a September 8, 2015 letter, which contained the "falsehoods":

> "(1) Sussman's 'termination of employment' and 'membership expulsion' resulted from 'inappropriate behavior consisting of multiple inappropriate sexual and racist remarks'
> (2) The Board acted in reliance upon 'an independent investigation'
> (3) During the expulsion hearing, 'Mr. Sussman's attorney stated "that the behavior was not so bad and should be tolerated." Such comments at the hearing confirmed Mr. Sussman's lack of understanding of he [sic] seriousness of his conduct.'
> (4) The Board possessed a valid, neutral report and voice recordings which proved Mr. Sussman to be a sexual harasser, which materials would be made available to League members at Director Ira Goldberg's office"

(*id.*, ¶ 57).

Here, again, the statements do not rise to the level of gross negligence. The statements accurately track the process as Sussman recounts it in his complaint, a report was completed, the results included the substantiation of a significant number of the allegations, an expulsion hearing was held, which resulted in the expulsion of Sussman from membership in the League. Sussman offers conclusory allegations that the report resulted in biased findings because it was not based upon the unfettered interviewing of all witnesses and the review of all available documents. Sussman's use of Barbieri's statements of opinion, and not fact, of Sussman's lawyer's comments to support his defamation claim does not satisfy the elements of the claim. The court finds that there is simply nothing in Barbieri's statements that evidences a callous disregard of the truth that harmed Sussman, and, therefore dismisses this cause of action.

g. Eighth Cause of Action: Tortious interference with prospective business advantage

In his eighth cause of action, Sussman alleges that Telenick, through his October 23, 2014 letter, defamed Sussman by "falsely accusing him of *quid pro quo* sexual harassment and racism"

(complaint, ¶ 59). According to the allegation set forth in the amended complaint, "[t]he letter was sent by Telenick with the malicious intention of inducing the League to fire Sussman, so that the position of director of the Vytlacil campus would become available to Telenick" (*id.*). Sussman was consequently fired, and lost his apartment, and was thereby economically injured.

Defendants move to dismiss this claim as it is barred by the common interest qualified privilege. As set forth above, the court finds that all claims against Telenick based upon his October 2014 letter are barred by the privilege. The court, therefore, dismisses the eighth cause of action.

h. The Ninth Cause of Action against the League: Conversion

In the ninth cause of action, plaintiffs allege that the League converted to its own possession the Sussmans' mail, which was received at the Vytlacil campus. In the body of the amended complaint, plaintiffs allege that defendants "stole all of the personal mail directed to the Sussmans at Vytlacil following their departure. The Sussmans became suspicious that their mail was being stolen when nothing was forwarded to them. Barbara Sussman therefore sent a letter . . . to [Sussman] at the Vytlacil campus. The letter was received but never forwarded to [Sussman]" (amended complaint, ¶ 14).

Defendants argue that this claim must be dismissed, because plaintiffs' allegations are conclusory. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). "'Two key elements of conversion are (1) the plaintiff's possessory right or interest in the property and (2) the defendant's dominion over the property or interference with it,

in derogation of plaintiff's rights'[citation omitted]" (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012]). To establish the claim, "it is not necessary that one should take physical possession of property to be guilty of conversion. Any wrongful exercise of dominion, by one other than the owner, is conversion" (*Suzuki v Small*, 214 App Div 541, 556 [1st Dept 1925] *affd* 243 NY 590 [1926]).

The complaint fails to set forth facts in a nonconclusory fashion showing that the League intentionally took possession of Sussman's mail for the purpose of interfering with Sussman's possessory interest (*Algomod Tech. Corp. v Price*, 65 AD3d 974, 975 [1st Dept 2009]). The court, therefore, dismisses this cause of action.

i. Bsussman's tenth cause of action: Trespass to Chattel and Tortious Interference with Contract

In the tenth cause of action, Bsussman alleges that the League seized valuable paintings held by Bsussman on behalf of her client for consultation purposes, which constituted trespass to chattel. Specifically, Bsussman alleges that after taking possession of plaintiffs' apartment, League personnel removed from the apartment, and the Sullivan Gallery storage area, several paintings on which Bsussman was consulting and returned them directly to their owner, Joe Liggio. Further, Bsussman alleges that this trespass tortiously interfered with her contractual relations with her client, and damaged her reputation for safekeeping artwork. Bsussman alleges additional pecuniary damages as she had to pay for the recovery of the paintings from Liggio to complete her work.

Defendants argue that these claims are deficient in that they are supported by vague and conclusory allegations, which are insufficient to maintain the claims.

The four elements of an action for trespass to chattel are: "(1) intent, (2) physical interference with (3) possession, resulting in (4) harm" (*Verizon New York v Consolidated Edison, Inc.*, 2010 WL 2469325, 2010 NY Misc LEXIS 2174, *4 [NY Sup, NY County 2010]).

> "To recover damages under a cause of action for trespass to chattel, a plaintiff must demonstrate that he or she sustained an 'actual injury' as a result of the defendant's tortious conduct . Generally, the 'actual injury' element is satisfied by evidence that the chattel was damaged as a result of the tortious conduct or that the plaintiff was deprived of the use of the chattel for some period of time [internal citation omitted]"

(*Sweeney v Bruckner Plaza Assoc.*, 57 AD3d 347, 355 [1st Dept 2008]).

Because Bsussman alleges that the defendants took physical possession of the paintings when they entered her apartment, depriving Bsussman of the paintings for a period of time, and as a result, she suffered harm in the form of damage to her reputation as well as pecuniary damage, the court will not dismiss this claim.

Further, defendants argue that Bsussman's claim for tortious interference with contract must be dismissed. "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Bsussman has not alleged defendants' knowledge of her contract with Liggio. Nor are there any allegations that defendants intentionally procured Liggio's breach of its contract with Bsussman, or that there was such a breach. In fact, it appears from the allegations in the amended complaint, that Bsussman's contract with Liggio was still intact after defendants allegedly took the paintings and sent them to Liggio, as Bsussman alleges she

suffered damage "in the form of expenses incurred physically recovering the paintings (on which she was still working) from Liggio . . . ." (amended complaint, ¶ 65).

As a result of these failings in the complaint, the court dismisses this cause of action.

j. The Eleventh Cause of Action: Intentional Infliction of Emotional Distress

As the court has already dismissed all claims against Telenick, the court only considers this claim as it is set forth against the League and Barbieri.

This tort has four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) severe emotional distress' (*Howell v New York Post Co., Inc.*, 81 NY2d 115, 121 [1993]). As for the first element, the Court of Appeals states that it is this element "serves a dual function of filtering out the petty and trivial complaints that do not belong in court, and assuring that the plaintiff's claim of severe emotional distress is genuine" (*id.*, 81 NY2d at 121). It is well-settled that such a claim must arise from conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*id.*, at 122). The facts alleged here are, on their face, not sufficiently outrageous or extreme to meet this standard. As a result, the court dismisses this cause of action.

k. The twelfth cause of action: prima facie tort

"Prima facie tort affords a remedy for 'the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful' [internal citation omitted]" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142 [1985]). "Basic to the assertion of prima facie tort is the allegation of special damages" (*Cunningham v*

Hagedorn, 72 AD2d 702, 704 [1st Dept 1979]). Furthermore, "[t]he 'plaintiff [] [must] allege that disinterested malevolence was the sole motivation for the conduct of which [he or she] complain[s]' [internal citation omitted]" (*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 403 [1st Dept 2014]).

Sussman pleads no facts that would support the essential element of intent of a prima facie tort. In his amended complaint generally, Sussman raises questions about Barbieri's motives in terms of his connections to the Venable Law Firm. He further states, in the body of the complaint, that Barbieri knew that Sussman was running for League president before his expulsion. Sussman does not raise these motives specifically with respect to his prima facie tort claim. Even if he had, not only are these motives stated in a vague and conclusory manner, but they are, even so, insufficient to establish this cause of action.

l. Thirteenth cause of action: Wrongful expulsion and conversion of property without due process of law

Sussman alleges that his membership in the League was a valuable property interest "including not only the right to participate in League activities and utilize League facilities, but also an undivided ownership interest in the League's valuable real property and cash on hand. According to Sussman, the defendants deprived him of this property interest without due process and converted it to their own use. Sussman has not alleged that he paid a fee, or exchanged any consideration, for membership in the League, nor has he offered in his complaint or his opposition papers the terms of membership as set forth by the League, or what benefits membership offers, other than his statement that his expulsion from the League "was harmful to him not only because it barred him from use of League facilities, but also because it damaged his

reputation, and barred him from his students' exhibitions and from memorial services for deceased colleagues" (amended complaint, ¶ 34).

As set forth above, "[a] conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d at 49-50). "'Two key elements of conversion are (1) the plaintiff's possessory right or interest in the property and (2) the defendant's dominion over the property or interference with it, in derogation of plaintiff's rights'[citation omitted]" (*Pappas v Tzolis*, 20 NY3d at 234).

"'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim . . . to it'" (*Matter of Miller v Goldberg*, 106 Misc2d 963, 966 [Sup Ct, Nassau County 1981], quoting *Board of Regents of State Colleges v Roth*, 408 US 564, 577 [1972]).

According to Sussman's allegations, Sussman paid no fee for membership, nor did membership in the League by itself afford an alleged financial benefit to Sussman. As described by Sussman, the harm caused by his expulsion from the League, loss of use of the facilities, and a consequential inability to view exhibits, or damage to his reputation, do not suggest that plaintiff had a property interest in his membership. Sussman is therefore unable to satisfy the first element of a conversion claim and the court dismisses this cause of action accordingly.

m. The Fourteenth Cause of Action; Failure to Pay Vacation and Sick Pay

In the fourteenth cause of action, Sussman alleges that when the League terminated his employment, it failed to compensate him for his accrued vacation time and sick days, as it was

required to do by law and by contract. Defendants argue for dismissal of this claim as plaintiff was an employee at will, and had no contract. In opposition, Sussman argues that he is relying on the terms of an oral contract to seek these benefits.

As there are questions of fact concerning the existence and terms of an oral agreement governing Sussman's employment at the League, the court will not dismiss this cause of action.

n. The Fifteenth Cause of Action Against all Defendants for Negligence

In this cause of action, plaintiffs allege that if defendants' actions were not malicious, they were reckless and negligent. As this cause of action does not allege an entirely separate cause of action, but simply refers to the other claims as set forth and dealt with above, the court refers the parties to the sections above in which it addressed and resolved each claim on its specifics.

In accordance with the foregoing, it is

ORDERED that the court grants defendant Robert Telenick's motion to dismiss the amended complaint as against him in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

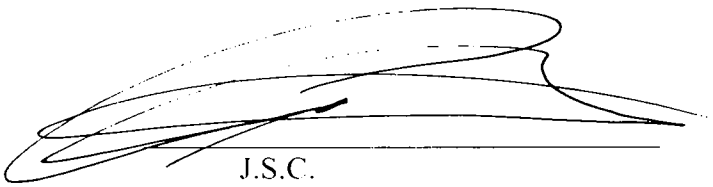
ORDERED that the court grants defendants' Salvatore Barbieri and New York Art Students' League's motion to dismiss to the extent that the Court dismisses the first, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, and fifteenth causes of action; and it is further

ORDERED that defendants Salvatore Barbieri and New York Art Students' League are directed to file an answer within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties appear for a preliminary conference in Part 43, at 111 Centre Street, in room 581, on October 13, 2016 at 9:30 a.m.

Dated: New York, New York
September 13 , 2016

ENTER:



J.S.C.